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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.H., A Person Coming Under the  
Juvenile Court Law.

B204484  
(Los Angeles County  
Super. Ct. No. CK66818)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSEPH B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.  
Richard D. Hughes and Robin Miller Soan, Judges. Reversed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for  
Appellant.

Raymond G. Fortner, County Counsel, James M. Owens, Assistant County  
Counsel, and Denise M. Hippach, Associate County Counsel for Respondent.

Appellant Joseph B. (Father), father of J.H. (J.), appeals from the juvenile court's jurisdictional order and the visitation portion of its dispositional order. Father contends substantial evidence did not support the juvenile court's determination that jurisdiction was proper under Welfare and Institutions Code section 300, subdivision (b).<sup>1</sup> We agree and reverse the jurisdictional order, rendering the dispositional order moot.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Referral to DCFS*

J. and his family came to the attention of DCFS as the result of a referral in late 2006, when he was 12 years old. At the time, he was living with his mother, Leticia H. (Mother), and had just gotten to know Father, who had been absent from the boy's life until mid-2006.

Interviewed by a caseworker in January 2007, J. described Father as a “[p]ervert” and related the following instances in which Father had engaged in discussions of a sexual nature: (1) in May 2006, Father asked J. whether he could see J.'s penis to determine if J. was circumcised; (2) in August 2006, Father asked J. if he wanted to spend the night in Father's bed and watch television, telling him it was normal behavior and that the other children did it; (3) in December 2006, Father suggested that J. and his younger step-siblings play a “game” which involved determining who had the most pubic hairs and the biggest penis; and (4) later in December, Father informed J. that he (Father) had lost his virginity at age 12 and would arrange a “hooker” for J. if J. so desired. In addition to these specific instances, J. recalled that Father occasionally made sexual comments

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<sup>1</sup> Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

about passing women to J., using crude language to ask if J. wanted to have sexual relations with them. J. had not acceded to any of Father's suggestions and denied that Father ever physically touched him. J. further denied ever seeing Father touch the other children in the family (J.'s step-siblings) inappropriately.

Father denied all these allegations and accused J. of lying. J.'s younger step-siblings denied hearing Father suggest the sexual game described by J. or witnessing Father engage in any other inappropriate discussions or behavior.

Mother explained that she and Father had had a brief relationship prior to J.'s birth in 1994. After Mother became pregnant with J., she heard reports that that Father had sexually molested a daughter from a previous relationship and decided to have nothing further to do with him. Consequently, Father had no contact with J. until J. asked to meet him in mid-2006, when J. was nearly 12. Mother located Father, established his parenthood through DNA, and began receiving child support and permitting regular weekend visitation. Shortly thereafter, Father allegedly tricked Mother into signing legal documents and submitting to a judgment that transferred custody of J. to Father. Father then took J. to live with him and his wife, without informing Mother and despite J.'s protestations. J. was with Father for approximately two weeks. During that time, Father enrolled him in a new school under a new name (Father's last name). Mother went to court and regained custody. Afterward, the family law judge ordered counseling for J. due to the trauma of having been taken from her.

Further investigation by DCFS revealed that between 2001 and 2007, nine referrals involving Father had been made to DCFS in San Bernardino County. All of the referrals were accusations of neglect or physical abuse of J. or his step-siblings. All but one, dated June 12, 2006 for "general neglect and physical abuse" of J.'s step-siblings, had been closed as inconclusive or unfounded. The June 2006

case remained open. DCFS also conducted a CLETS (California Law Enforcement Telecommunications System) scan. It showed that Father had an extensive criminal history, including impersonating a public officer, embezzlement, passing insufficient funds checks, giving false information to a peace officer, and forging a vehicle registration. The CLETS report also showed a 1991 arrest for lewd and lascivious act with a child under 14 that had been dismissed for lack of evidence.<sup>2</sup>

In the detention report, the caseworker stated that Father should have a mental health evaluation and recommended that the court order a “[m]ultidisciplinary assessment” of J., Mother, and Father, “including an assessment of the child’s physical and psychological status.” After the detention hearing, J. was left in Mother’s custody.

### *B. Petition*

The petition alleged that Father’s conduct supported jurisdiction under section 300, subdivision (b) (failure to protect) and subdivision (d) (sexual abuse). Specifically, the petition stated that J. was subject to dependency jurisdiction under subdivision (b) because “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or legal guardian to supervise or protect the child adequately.” It stated that J. was subject to jurisdiction under subdivision (d) because “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in subdivision (b) of section 11165.1 of

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<sup>2</sup> DCFS did not conduct any further investigation into the subject matter of these reports, and Father’s record was mentioned at the jurisdictional hearing only to support that he lacked credibility as a witness.

the Penal Code, by his or her parent or guardian or a member of the child's household."

The same facts were said to support jurisdiction under both subdivision (b) and subdivision (d). According to the petition, Father "established a detrimental and endangering situation for the child" and "endanger[ed] the child's physical and emotional health and safety and place[d] the child at risk of harm, damage and danger" by "behav[ing] in a sexually inappropriate manner to the child" on numerous occasions, including: (1) "[Father] repeatedly requested to see and inspect the child's penis"; (2) "[Father] discussed the size of the child's penis with the child"; (3) "[Father] stated that he would arrange for the child to engage in sexual intercourse on the child's next visit with the father"; and (4) "[Father] asked the child to spend the night in [Father's] bed with [Father]." As a result of the behavior, J. was allegedly "uncomfortable, sexually threatened and afraid of [Father]." In addition, J. "no longer wishe[d] to have contact with [Father] due to [his] sexual advances to the child."

### *C. Jurisdiction/Disposition*

In the jurisdiction/disposition report, the caseworker stated that J. was afraid of Father and did not want any contact with him. The caseworker further stated: "[T]here is no evidence thus far that there is any father/son bond between [Father] and [J.,] age 12. The father and minor did not have any contact until last year when the minor was 11 years old." As in the detention report, the caseworker recommended a mental health evaluation for Father in the belief that the evaluation "would indicate if [Father] would possess any risks of danger to [J.] or other minors" and the evaluator would assist in recommending appropriate reunification services for Father. In addition, DCFS recommended monitored visitation for

Father “after it is deemed safe and appropriate by [the] evaluator and . . . *only* with [J.’s] consent.” (Emphasis original.)

At the jurisdictional hearing, J. testified that everything he had previously told the caseworker was true. He also testified he did not want visitation with Father because Father had essentially kidnapped him and made numerous comments that caused him to feel uncomfortable.

Counsel for DCFS argued that the court should find jurisdiction under both subdivision (b) and subdivision (d) of section 300 based on (1) Father’s statements to J., particularly the offer to take him to a prostitute which counsel described as a violation of Penal Code section 11165’s prohibition on inducing a child to engage in prostitution; and (2) his actions in taking J. from Mother through trickery, although that fact had not been alleged.

Counsel for the minor expressed the belief that the evidence did not support a finding of sexual abuse for purposes of section 300, subdivision (d). With respect to subdivision (b), counsel stated that J. had indicated “fear of [Father], rising above discomfort,” in particular, “fear that [Father] might want to touch him” or “sleep with him in a sexual manner,” but noted that subdivision (b) required “serious physical harm.” Accordingly, the minor’s counsel urged the court to amend the petition to conform to proof to add a reference to section 300, subdivision (c) (emotional damage), and to make a finding of jurisdiction based on emotional injury or risk of emotional injury to J. According to the minor’s counsel, a true finding under subdivision (c) was supported not only by the inappropriate sexual comments, but also by Father’s actions in tricking Mother to turn over custody and his lack of concern for J.’s emotional well-being when he took J. from the custody of the parent who had raised him and enrolled J. in a new school under a new name. She argued that J. was beginning to suffer, or was at substantial risk of suffering, severe anxiety as a result of Father’s actions.

Father's counsel argued that there was insufficient evidence to sustain the petition under section 300, subdivision (b) or subdivision (d), and contended that amending the petition to add a new charge at that late date would violate Father's due process rights.

After hearing the evidence and the arguments of counsel, the court declined to amend the petition to add a section 300, subdivision (c) allegation due to the lack of information from any medical or mental health professionals concerning J.'s mental state. The court concluded that the allegation of sexual abuse or risk of sexual abuse under section 300, subdivision (d) had not been established, and dismissed that allegation. The court found jurisdiction existed under subdivision (b). The court did not specify the basis for its subdivision (b) finding.

To clarify its factual findings, the court amended the language of the petition, finding that Father: (1) "requested to see and inspect the child's penis" (deleting the word "repeatedly"); (2) "discussed the size of the child's penis with the child"; (3) "stated that he would arrange for the child to engage in sexual intercourse" (deleting the phrase "on the child's next visit with [Father]"); and (4) "asked the child to spend the night in [Father's] bed with [Father]." The court also amended the petition with respect to the allegation of the impact of this behavior on J., finding that Father's behavior caused J. to be "uncomfortable" and "afraid of [Father]" but not that Father caused J. to feel "sexually threatened." The court also amended the allegation concerning J.'s desire to have no contact with Father, finding that this was due to Father's "sexually inappropriate behavior" rather than his "sexual advances to the child."

At the dispositional hearing, the court discussed with Father and his counsel whether to order a psychological evaluation of Father as recommended by DCFS in its reports. Father agreed instead to waive confidentiality with respect to his individual therapist. The court set a progress hearing two months in the future to

determine whether a separate psychological evaluation would nevertheless be needed, and instructed the caseworker to talk to Father's therapist. The court ordered Mother to participate in parent education and conjoint counseling, if recommended by J.'s therapist. Father was ordered to participate in parent education and individual counseling to address case issues, including inappropriate "sexualized content" discussions with J., and conjoint counseling with J. if recommended by J's therapist. With respect to visitation, the court ordered "[n]o visits for [Father] at this time until recommended by the minor's therapist in consultation with the minor's attorney and [DCFS]."

Father timely appealed the jurisdictional and dispositional orders.

## **DISCUSSION**

### *A. Standard of Review*

Before asserting jurisdiction over a minor, the juvenile court must find that he or she comes within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) The burden is on DCFS to "“prove by a preponderance of the evidence that the child . . . comes under the juvenile court's jurisdiction.”" (*Ibid.*, quoting *In re Shelly J.* (1998) 68 Cal.App.4th 322, 329.) "On appeal from an order making jurisdictional findings, we must uphold the court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value." (*In re Veronica G.*, *supra*, at p. 185.)



### *B. Sufficiency of Petition*

DCFS alleged in the petition that assertion of dependency jurisdiction was appropriate under subdivisions (b) and (d) of section 300.<sup>3</sup> With respect to subdivision (b), the petition alleged that J. had suffered, or there was a substantial risk that J. would suffer, serious physical harm or illness “as a result of the failure or inability of his or her parent or legal guardian to supervise or protect the child adequately.” With respect to subdivision (d), the petition alleged that “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in subdivision (b) of section 11165.1 of the Penal Code, by his or her parent or guardian or a member of the child’s household.”

The parties dispute whether the petition contained allegations sufficient to support a finding of jurisdiction under either subdivision (b) or subdivision (d) of section 300 and whether Father waived this issue by failing to assert it earlier. We need not resolve the waiver issue because the petition as pled was clearly adequate. The petition alleged that J. was subject to the dependency jurisdiction because Father engaged in certain alleged conduct -- asking to inspect the boy’s penis,

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<sup>3</sup> Subdivision (b) applies in four situations, where the minor “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness,” as the result of (1) “the failure or inability of his or her parent or guardian to adequately supervise or protect the child”; (2) “the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left”; (3) “the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment”; or (4) “the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . mental illness, developmental disability, or substance abuse.”

Subdivision (d) applies where the child “has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.”

asking him to spend the night with Father in Father's bed, and offering to arrange for J. to engage in sexual intercourse -- and did so for the purpose of making sexual advances to J. If proven by a preponderance of the evidence, this would have established a substantial risk that J. would be sexually abused by Father. Thus, the pleading was sufficient for purposes of subdivision (d).

With respect to subdivision (b), a true finding that the minor is subject to a substantial risk of serious physical harm can be based on proof of sexual abuse or a serious risk of future sexual abuse. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; see *In re Alysha S.* (1996) 51 Cal.App.4th 393, 398 [“[N]othing . . . precludes [DCFS] from arguing [that] pleaded facts establish a cause of action under section 300, subdivision (b), notwithstanding that they might also establish a cause of action under subdivision (d). . . . It may be inferred from the fact of a lewd touching that the victim suffered serious physical harm . . . .”].)

#### *B. Sufficiency of Evidence to Support Jurisdiction*

To support the petition's allegations that assertion of dependency jurisdiction over J. was appropriate under subdivisions (b) and (d) of section 300, DCFS presented evidence of the inappropriate comments and suggestions Father made to J. over the course of their brief relationship. There was no evidence presented that Father ever physically touched or otherwise injured J. The trial court found that the evidence did not support a finding under subdivision (d) and dismissed that allegation, striking, inter alia, the petition's allegation that Father had made “sexual advances to the child.” However, the court found true the allegation under subdivision (b) that J. “has suffered, or there is a substantial risk that [he] will suffer, serious physical harm or illness,” as the result of “the failure or inability of his or her parent or guardian to supervise or protect the child

adequately.” Father contends substantial evidence does not support the finding under section 300, subdivision (b). We agree.

A true finding under subdivision (b) requires proof of three elements: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 820; accord, *In re David M.* (2005) 134 Cal.App.4th 822, 829; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) The issue raised by Father is whether the evidence and findings of the juvenile court supported the third element -- “serious physical harm or illness” or a “substantial risk” that J. would suffer such harm or illness.

“The third element . . . effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future.” (*In re Savannah M.*, *supra*, 131 Cal.App.4th at p. 1396.) In determining whether a risk of serious physical harm exists for purposes of subdivision (b), courts draw guidance from section 300, subdivision (a), which applies where “the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian” and provides: “[A] court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the minor or the minor’s siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm.” (See, e.g., *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 823; *In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 399; *In re Janet T.* (2001) 93 Cal.App.4th 377, 388.)

Here, there was evidence of numerous inappropriate comments and suggestions, but no evidence of physical injury inflicted on J. On the evidence presented, the court could have found in accord with the theory of the petition that

Father's inappropriate comments and suggestions were intended as sexual advances and, therefore, J. was at risk for both sexual abuse and serious physical harm. (*In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 398.) However, the court dismissed the subdivision (d) allegation, indicating it did not believe J. was at risk of sexual abuse. Moreover, it specifically found that Father's actions were not "sexual advances" and that J. had not been "sexually threatened" by Father, deleting those allegations from the petition at the jurisdictional hearing.<sup>4</sup>

"Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 823; accord, *In re Janet T.*, *supra*, 93 Cal.App.4th at p. 391; *In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 399.) Appellate courts have often been compelled to reverse a finding of jurisdiction under subdivision (b), where the facts and the juvenile court's findings establish wrongdoing of some sort on the part of the parents, but not the risk of serious physical harm or illness required by the subdivision. (See, e.g., *In re David M.*, *supra*, 134 Cal.App.4th at pp. 829-830 [jurisdictional order reversed where parents' mental problems and mother's occasional marijuana use not tied to evidence of specific, defined risk of serious physical harm to minors]; *In re Janet T.*, *supra*, 93 Cal.App.4th at pp. 388-389 [sustained allegation that mother failed to ensure minors' school attendance did not support finding of substantial risk of serious physical harm or illness, although "lack of education may well cause

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<sup>4</sup> On appeal, respondent contends for the first time that Father posed a risk of serious physical harm based on the theory that if J. had agreed to have sexual intercourse with a prostitute, he might have jeopardized his health. There was no evidence of any likelihood that J. would agree to Father's inappropriate offer. Jurisdiction cannot be based on a "possible harm[]" that *could* come to pass" or on harm that is "merely speculative." (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830.)

psychic or emotional or financial or social harm”]; *In re Alysha S.*, *supra*, 51 Cal.App.4th at pp. 398-399 [allegation and finding that father once touched minor in a manner mother felt was inappropriate did not establish risk of serious physical harm]; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318-1319 [fact that mother suffered from delusion that minor’s penis had been mutilated did not establish jurisdiction under subdivision (b), where juvenile court struck allegation that mother would act on her delusion].)

Subdivision (b) of section 300 is not a catch-all for establishing dependency jurisdiction when the parent’s behavior is not easily categorized. A finding that jurisdiction is appropriate under its provisions must be based on substantial evidence of serious physical harm or a risk of serious physical harm. Certainly, Father’s behavior toward J. was inappropriate. However, it was not physically abusive and, after reviewing the evidence, the juvenile court was not persuaded that it signified sexual abuse or the threat of sexual abuse. At the same time, the court was unable to amend the petition and sustain jurisdiction under section 300, subdivision (c), as suggested by the minor’s counsel, because DCFS did not present evidence that J. was suffering or at risk of suffering serious psychological or emotional harm due to Father’s conduct.<sup>5</sup> Where DCFS “fail[s] to prove the grounds it asserted or to assert the grounds it might have proved,” the jurisdictional order cannot be affirmed. (*In re Janet T.*, *supra*, 93 Cal.App.4th at p. 392.)<sup>6</sup>

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<sup>5</sup> Section 300, subdivision (c) applies where “[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care.”

<sup>6</sup> Nothing in our decision precludes DCFS from attempting to establish jurisdiction by demonstrating that J. is in peril and that it is in his best interest to be brought within the protection of dependency jurisdiction. It can do so by filing a properly pled petition

In light of our determination that the jurisdictional order must be reversed, the dispositional and visitation order is also reversed.

**DISPOSITION**

The jurisdictional order is reversed. The dispositional and visitation order is thus moot.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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supported by the evidence. (See *In re Janet T.*, *supra*, 93 Cal.App.4th at p. 392 [“Our conclusion that the sustained allegations of the petition do not support jurisdiction does not mean the DCFS cannot try again.”]; accord, *In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 400.)